

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the  
Commission's Own Motion to Assess and Revise  
the New Regulatory Framework for Pacific Bell  
and Verizon California Incorporated.

Rulemaking 01-09-001  
(Filed September 6, 2001)

Order Instituting Investigation on the  
Commission's Own Motion to Assess and Revise  
the New Regulatory Framework for Pacific Bell  
and Verizon California Incorporated.

Investigation 01-09-002  
(Filed September 6, 2001)

**ADMINISTRATIVE LAW JUDGE'S RULING REGARDING PACIFIC BELL'S  
MOTION TO CONFIRM ITS RIGHT TO CONDUCT DEPOSITIONS**

Pacific Bell's (Pacific's) 's motion to confirm its right to conduct depositions  
is denied, subject to the qualifications contained herein.

**Background**

Pacific filed a motion on May 1, 2002, in which it asks the Commission to  
(1) affirm Pacific's right to take depositions in Phases 2A and 2B, and to record  
such depositions by way of videotape and/or audiotape, and (2) order parties to  
produce their witnesses at the time and place indicated in Pacific's notices for  
deposition.<sup>1</sup> Pacific states that it is necessary to take depositions because of the

---

<sup>1</sup> Pacific did not indicate in its motion whom was served with its notices for deposition  
or the time and place of the depositions. Subsequent filings in this proceeding  
indicate that Pacific has served notices of depositions on the staff of the Commission's  
Office of Ratepayer Advocates (ORA) and consultants hired by ORA and the  
Commission's Telecommunications Division (TD).

extraordinarily compressed schedule for Phase 2A established by the assigned Commissioner's ruling issued on April 24, 2002. Under that schedule, opening testimony is due on May 8, 2002, reply testimony is due on May 17, and hearings begin on May 29. Pacific argues that under the abbreviated schedule, depositions provide an efficient and cost-effective means to thoroughly address all the issues without the threat of surprise.

The Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN) filed a joint response to Pacific's motion on May 6, 2002. ORA and TURN urge the Commission to deny Pacific's motion. In the alternative, they believe that all parties should be granted equivalent deposition rights. If the Commission chooses the latter, ORA and TURN state that the Commission must safeguard the parties' rights with regard to time limits and notice requirements.

ORA and TURN assert that Pacific does not have an unconstrained right to take depositions. They also argue that depositions are unnecessary and burdensome for the following reasons:

- It is not common practice at the Commission for parties to take depositions, since other means exist for parties to conduct discovery.
- Depositions are unnecessary and redundant because Pacific has the prepared testimony of the witnesses, may cross-examine the witnesses, and has submitted and received responses to numerous data requests.
- Depositions are unduly burdensome because the consultants that are providing key portions of ORA's testimony are located out of state. Due to budgetary constraints, travel for ORA's lawyers and analysts has been severely restricted.
- Depositions are unduly burdensome because they would strain the already overtaxed resources of ORA and TURN. Neither ORA nor TURN have sufficient resources under the newly shortened schedule to simultaneously respond to Pacific's data requests, review Pacific's testimony, prepare reply testimony, prepare for hearings, and defend

depositions. Pacific, in contrast, has in-house counsel and has hired at least two outside firms to work on discovery.

ORA and TURN also oppose Pacific's request to videotape depositions. They assert that videotaping will increase costs, prolong depositions, intimidate witnesses, and are unnecessary in light of the fact that the assigned Administrative Law Judge (ALJ) may observe witnesses first hand. Finally, ORA and TURN ask the Commission to quash Pacific's notices of deposition.

### **Discussion**

Parties in Commission proceedings may take depositions pursuant to Pub. Util. Code § 1794. This statute states, in relevant part, as follows:

[A]ny party may, in any investigation or hearing before the commission, cause the deposition of witnesses . . . to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this state under Article 3 (commencing with Section 2016) of Chapter 3 of Title 4 of Part 4 of the Code of Civil Procedure. [CCP]

The opportunity to take depositions is not unlimited under the CCP, to which this Commission looks for guidance in discovery matters. Under the CCP, the scope of depositions may be limited if the court (or this Commission) finds that the burden, expense, or intrusiveness of the depositions sought outweighs the likelihood that the information obtained will lead to admissible evidence. (CPP § 2017(c)) Depositions may also be restricted where the discovery sought is unreasonably cumulative, duplicative, or obtainable from another source that is more convenient, less burdensome, or less expensive. (CCP § 2019(b)(1)) In addition, for good cause shown, the court may issue an order to protect any party from unwarranted annoyance, embarrassment, oppression, or undue

burden and expense. The protective order may include, but is not limited to, an order that the deposition not be taken at all. (CPP § 2025(i))

The Commission's usual practice is to allow parties to conduct discovery through data requests, as this method has proven over time to be relatively convenient, inexpensive, and less burdensome compared to alternative methods such as depositions. However, when used appropriately, the taking of depositions in Commission proceedings can serve as a valuable means of testing another party's contentions and its witnesses' veracity. (D.02-01-025, 2002 Cal. PUC LEXIS 38, \*10 - 11.)

In its motion, Pacific submits an overly broad request to "confirm its right" to take depositions. As stated previously, Pacific does not have an unlimited right to take depositions. Pacific should proceed in accordance with the normal Commission practice of conducting discovery through data requests. Although Pacific has made a forceful argument that the tight schedule for Phase 2A might render the use of data requests impractical in some circumstances, ORA and TURN have made an equally forceful argument that the use of depositions in Phase 2A would be extremely burdensome.

Without more information, it is not possible to weigh Pacific's alleged need to take depositions against the burden the depositions would clearly impose. However, it is possible to make some preliminary determinations pursuant to the authority under CCP § 2017(c), § 2019(b), and § 2025(i)(5) with respect to the terms and conditions for conducting depositions and other discovery. First, to minimize the potential need for depositions, all parties should provide responses within 48 hours of receiving a data request. The response must provide either the requested information or a firm deadline for when the information will be provided. Second, the cutoff for submitting data requests in Phase 2A is

Tuesday, May 21, 2002. The cutoff in each subsequent Phase will be five days after the submittal of reply testimony in that Phase. Third, parties should rely on data requests and use depositions only when absolutely necessary. Fourth, any depositions of ORA witnesses shall occur at a location of ORA's choosing. The person or entity deposing ORA witnesses must pay for the cost incurred by out-of-state witnesses to travel to and obtain lodging in San Francisco (or other location convenient to ORA). (CCP § 2025(e)(3) and 2025(i)(5)) Fifth, parties may not ask questions of ORA witnesses that delve into matters protected by deliberative process privilege or other privileges. Sixth, videotaped depositions will not be allowed. (CPP § 2025(i)(5) and (8)) Finally, copies of deposition transcripts shall be provided to Commission staff without charge.

In light of the compressed schedule, if a party receives a notice of deposition and opposes the deposition, it should immediately notify the party seeking the deposition. Because depositions are not a favored means of conducting discovery in Commission proceedings, the party seeking a deposition will have the burden of demonstrating the need for the deposition opposed by the potential deponent by filing a motion to compel deposition. Any such motion must identify with specificity the information to be obtained through deposition and explain why the information cannot be obtained through data requests or other less burdensome means. In addition, any motion to compel deposition by ORA witnesses must demonstrate that the information sought is not protected by deliberative process privilege or other privileges. Responses to motions must be submitted within 24 hours. The party submitting the motion will have the responsibility of arranging a conference call with the Law and Motion Judge to resolve the motion.

With certain exceptions, the previously described procedures will not apply to TD due to its special status. TD is not a party to this proceeding, but a division of the Commission that advises decision makers. TD's task in this proceeding has been to manage an audit that was ordered by the Commission. The auditors are not expert witnesses hired by a party to this proceeding, but consultants retained by the Commission to perform work that -- given more time and resources -- TD could have performed itself. The normal way to obtain information from TD or the Commission is via the California Public Records Act. However, the Public Records Act does not expressly provide for depositions.

In order to provide a reasonable opportunity to conduct discovery while simultaneously recognizing the special status of TD and its auditors (referred to collectively hereafter as "TD"), parties may file and serve requests to depose TD, but such requests will be subject to close scrutiny. Any such request must (1) identify with specificity the information to be obtained through deposition, (2) explain why the information cannot be obtained through data requests or less burdensome means, and (3) demonstrate that information sought is not protected by deliberative process privilege or other privileges. The party filing a request will have the responsibility of arranging a conference call with the Law and Motion Judge to resolve the request. If a request is granted, the person or entity deposing TD must (i) pay for the travel and lodging costs incurred by out-of-state witnesses to travel to San Francisco or other location convenient to TD; (ii) cannot ask questions that delve into matters protected by deliberative process privilege or other privileges; (iii) cannot videotape the deposition; and (iv) must provide a copy of the deposition transcript to Commission staff without charge.

Parties should be extremely hesitant about filing requests to depose TD at this late hour. There has been ample opportunity to conduct discovery related to

TD's audit report that was released on February 20, 2002. TD has responded to the many data requests that it has received, and will continue to do so. There will also be an opportunity to cross-examine TD's witnesses in the forthcoming hearings. In light of these circumstances, any party that seeks to depose TD bears a heavy burden to justify its request.

Therefore, **IT IS RULED** that:

1. Pacific Bell's motion to confirm its right to conduct depositions is denied, subject to the qualifications set forth in the body of this ruling.
2. The cutoff for propounding discovery requests in Phase 2A is May 21, 2002. The cutoff for discovery in each subsequent Phase is five days after the submittal of reply testimony for that Phase.

Dated May 14, 2002, at San Francisco, California.

/s/ TIMOTHY KENNEY

---

Timothy Kenney  
Administrative Law Judge

## CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Regarding Pacific Bell's Motion to Confirm its Right to Conduct Depositions on all parties of record in this proceeding or their attorneys of record.

Dated May 14 2002, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

## N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

\*\*\*\*\*

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY **1-866-836-7825 or (415) 703-5282 at least** three working days in advance of the event.